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No. 82-6695

IN THE

SUPREME COURT OF THE UNITED STATES

RUSSELL T. PALMER,

Cross-Petitioner,

v.

TED S. HUDSON,

Cross-Respondent.

BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GERALD L. BALILES
Attorney General of Virginia

ALAN KATZ
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Fifth Floor
Richmond, Virginia 23219

QUESTIONS PRESENTED

I. Does the intentional deprivation of property by an official's abuse of power constitute a due process violation not withstanding the existence of State remedies?

II. Does the intentional deprivation of property by an official's abuse of power constitute a due process violation where State relief is available?

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OPINIONS

The opinion of the United States District for the Western District of Virginia is unreported and was included as Appendix A to Petitioner Hudson's Petition for Writ of Certiorari. The opinion of the Court of Appeals is as yet unreported and was included as an appendix to Petitioner Husdon's Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is founded on 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On September 16, 1981, the cross-petitioner's cell at the Bland Correctional Center was subjected to a shakedown search for contraband by prison authorities. Palmer alleged in his pro se suit filed on September 28, 1981, in the United States District Court for the Western District of Virginia, that during the course of this search certain of his property was destroyed in an effort to harass him.

Palmer further alleged that the shakedown search was not routine and was planned and carried out as a form of harassment.

Cross-petitioner also alleged that on September 17, 1981, he was again harassed by Officer Hudson and suffered disciplinary action as a result of Correctional Officer Hudson's placement of a false charge against him.

By an order of November 17, 1981, the District Court accepted as true Palmer's allegations and found that they did not rise to the level of a constitutional deprivation.

Palmer appealed to the Fourth Circuit Court of Appeals, and on January 6, 1983, the Court held that while the allegations did state a possible Fourth Amendment violation, the intentional taking and destruction of property was governed by this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981), and that there was no due process violation.

REASONS FOR DENYING THE WRIT

I. PARRATT V. TAYLOR IS APPLICABLE TO CASES INVOLVING AN ALLEGED INTENTIONAL, ABUSIVE DEPRIVATION OF PROPERTY BY AN OFFICIAL.

It appears to be the contention of cross-petitioner Palmer that where an inmate alleges that he has been deprived of personal property as a result of an abuse of power, as opposed to negligence or a random and unauthorized deprivation, a due process claim cognizable pursuant to 42 U.S.C. § 1983 has been stated and this Court's decision in Parratt v. Taylor is inapplicable. Cross-petitioner's analysis, however, ignores the fact that Parratt, supra, merely holds that the constitutional requirement of procedural due process is satisfied if the State provides a post facto remedy for an injury inflicted by an official which was not done pursuant to an established policy and was not amenable to prior control. Parratt does not impinge upon the right to a § 1983 remedy for an officially inflicted injury done pursuant

to an established procedure, which remains a violation of the requirement of procedural due process, Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982), or for an official act which violates a substantive constitutional right, such as the right to vote, Duncan v. Poythress, 657 F.2d 691, 704-5 (5th Cir. 1981), or for an official act which is sufficiently egregious to amount to a violation of the requirement of substantive due process, Schiller v. Strangis, 540 F.Supp 605, 613-15 (D.Mass. 1982).

In these cases, it is submitted, the rationale of Parratt is inapplicable not because of any artificial distinction as to the nature of the deprivation, but because the post deprivation remedy, if any, is inadequate to preserve the right to due process. For example, in Zimmerman Brush established state procedure rather than providing a means to cure a violation of rights prevented a post deprivation remedy from being utilized. Therefore, it is clear that Parratt's reasoning does not apply because there is no adequate post deprivation remedy. In fact, in Ingraham v. Wright, 430 U.S. 651 (1937), this Court was confronted with the claim that corporal punishment in public schools violated due process. Ingraham, cited with approval in Parratt, and which involved facts more egregious than those presented in Parratt, held that the imposition of additional administrative safeguards as a constitutional requirement before the institution of corporal punishment was unnecessary, and that there was no due process deprivation by the absence of such administrative safeguards when viewed in light of the low incidents of abuse, the openness of the schools, and the common law safeguards that already existed. Ingraham is significant in light of the fact that it involved an allegation of the

intentional abuse of official power by an agent of the State. This Court's conclusion was that such an allegation did not rise to the level of a constitutional deprivation of due process. This is analogous to the case at bar and amounts to a rejection of cross-petitioner's theory that Parratt was misapplied in the instant case.

It is submitted that this Court recognized in Parratt that §1983 is not a remedy for every wrong committed by State officials. It is only a remedy for those wrongs which are of a constitutional dimension and which violate a federal statute. Specifically, this Court noted that in any §1983 action the initial inquiry must focus on whether the two essential elements to a §1983 action are present: (1) whether the conduct complained of was commited by a person acting under the color of state law; and (2) whether this conduct deprived the person of rights, privileges, or immunities secured by the Constitution of the United States. The Court went on to note that nothing in the Fourteenth Amendment protects against all deprivations of life, liberty, or property by the state. The Fourteenth Amendment protects only against deprivations without due process of law. The cross-respondent notes that nothing in Parratt limits its application to any particular type of alleged deprivation. It is submitted that whether the cross-petitioner's claim is based on an abuse of power or the existence of random or unauthorized acts is irrelevant. The significance of Parratt is that it stands for the proposition that where there has been a deprivation of property under color of state law, for whatever reason, and the state provides an adequate remedy to redress that loss, the requirements of due process have been met and the Constitution has not been violated. None of the cases cited by the cross-petitioner

contradict that principle and, it is submitted, therefore, whether the alleged deprivation was the result of an abuse of power or due to random and unauthorized intentional acts, the fact remains that if there is an adequate post-deprivation remedy there is no deprivation of due process.

II. VIRGINIA PROVIDES A DEFINITE, EFFECTIVE POST-DEPRIVATION REMEDY.

It is plaintiff's contention that unlike the State of Nebraska in Parratt v. Taylor, Virginia does not provide a reliable post-deprivation remedy for tort claims. The cross-petitioner reaches this result because, allegedly, "Virginia's civil law is still heavily infested with large pockets of immunity often barring relief". Cross petitioner further contends that at the least the law of Virginia is unsettled and, consequently, there is no certain post-deprivation remedy against official deprivation in fact in Virginia. The cross-petitioner's argument in this regard ignores the existence of §8.01-195.1 et seq of the Code of Virginia which became effective July 1, 1982, and provides for a tort claims act in Virginia similar to the Nebraska tort claims act. These sections specifically provide that the Commonwealth of Virginia will be liable for claims for money due to damage to or loss of property caused by the negligent or wrongful act or omission of any State employee within the scope of his employment.

Therefore, it is submitted that contrary to the cross-petitioner's allegation, the law in Virginia is quite clear that as to claims arising after July 1, 1982, the Commonwealth of Virginia has waived its sovereign immunity and provided a procedure for the resolution of tort claims against it. Consequently, it is incorrect to assume that there is no certain post-deprivation remedy in Virginia and, more importantly, the enactment of the Virginia Tort Claims Act severely restricts the possible application of any rule enunciated by this Court

in this case to the limited facts of the instant case and would preclude application to any case which arises after the effective date of the act. It is, therefore, further submitted that certiorari should be denied because of the limited application and significance of this matter.

III. THE LOWER FEDERAL COURTS HAVE BEEN CONSISTENT IN THEIR APPLICATION OF PARROTT V. TAYLOR.

In support of the proposition of inconsistent application, the cross-petitioner cites a number of cases which, it is submitted, are not supportive of his contention that the lower federal courts have given the decision in Parratt v. Taylor fundamentally varying application. The cross-petitioner cites Wright v. Dallas County Sheriff's Department, 660 F.2d 623 (5th Cir. 1981); Madyun v. Thompson, 657 F.2d 868 (7th Cir. 1981); and Hirst v. Gertzen, 676 F.2d 1252 (9th Cir. 1982) as examples of these types of cases. However, a close examination of these cases indicates that Wright and Madyun are merely cases in which the court of appeals remanded the case for reconsideration in light of Parratt v. Taylor. Wright, Madyun and Hirst do not stand for the proposition that Parratt does not apply to intentional torts, inasmuch as the cases did not involve allegations of intentional conduct.

In Weiss v. Lehman, 676 F.2d 1320 (9th Cir. 1982) cited by the cross-petitioner, the Court merely applied Parratt v. Taylor in the same manner as has this Court. Again, there was no allegation in the case of intentional conduct, and it is, therefore, distinguishable from the instant case.

The cross-respondent submits that contrary to the cross-petitioner's assertion, the lower federal courts are not inconsistent in their application of Parratt v. Taylor. In actuality, given the existence of varying factual patterns, the lower federal courts have been diligent in their adherence to the precepts enunciated by this Court in Parratt.

CONCLUSION

For the reasons set forth above, cross-repondent urges this Court to deny the Writ of Certiorari.

Respectfully submitted,

GERALD L. BALILES
Attorney General of Virginia

ALAN KATZ
Assistant Attorney General
Counsel of Record

Supreme Court Building
101 North Eighth Street
Fifth Floor
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Alan Katz, Assistant Attorney General of Virginia, Counsel of Record for the Cross-respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that 3 copies of the foregoing Brief in Opposition To The Petition For Writ of Certiorari were mailed, first class/postage prepaid, to Deborah Wyatt, 917 East Jefferson Street, Charlottesville, Virginia 22901 on or before June 5, 1983.

Alan Katz
Assistant Attorney General

No. 82-6695

IN THE

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October Term, 1983

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Comes now the Cross-Petitioner, Russell Thomas Palmer, Jr., by his undersigned counsel, and hereby moves this Honorable Court for leave to proceed in forma pauperis. In support he submits the affidavit attached hereto and represents that he has been granted leave to proceed in forma pauperis in the courts below including the United States District Court for the Western District of Virginia, Abingdon Division, and the Fourth Circuit Court of Appeals, to which a Writ of Certiorari is being sought by Cross-Petitioner.

Respectfully submitted,

RUSSELL THOMAS PALMER, JR.

By Counsel

Deborah C. Wyatt
Wyatt, Rosenfield & Green
917 East Jefferson Street
Charlottesville, Virginia 22901
Counsel for Cross-Petitioner

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AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Deborah C. Wyatt, Counsel for Cross-Petitioner, having been duly sworn, do depose and say as follows:

1. That I was appointed by the Fourth Circuit Court of Appeals to represent Russell Thomas Palmer, Jr., Respondent and Cross-Petitioner herein;

2. That Mr. Palmer proceeded in forma pauperis in the District Court and the Court of Appeals below; and

3. That to the best of my knowledge and belief, Mr. Palmer has recently been released from prison on parole, remains a pauper, and has not contacted me since his release.

DEBORAH C. WYATT

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE, to-wit:

The foregoing Affidavit was subscribed and sworn to before me by Deborah C. Wyatt, on this 4th day of May, 1983.

Louise N. McLaughlin
Notary Public

My commission expires: June 3, 1984.

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AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Russell Thomas Palmer, Jr., having been duly sworn, depose and say as follows:

1. I am a Cross-Petitioner in the above-titled case;

2. I have recently been released from prison on parole, and do not yet have any reliable source of income;

3. Because of my poverty, I am unable to pay fees and costs associated with the above-titled action.

RUSSELL THOMAS PALMER, JR.

STATE OF VIRGINIA

CITY/COUNTY OF _____, to-wit:

The foregoing Affidavit was subscribed and sworn to before me by Russell Thomas Palmer, Jr., on this ____ day of _____, 1983.

Notary Public

My commission expires:_____.

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AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Russell Thomas Palmer, Jr., being first duly sworn, depose and say that I am the Cross-Petitioner in the above-entitled case; that in support of my motion to proceed on certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issue which I desire to present is the following:

> That an intentional, abusive deprivation of property by an official states a due process violation.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the case are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1976, self employed. -WAGE NOT KNOWN-

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NONE

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? No

   a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? YES

   a. If the answer is yes, describe the property and state its approximate value. ONE 1957 FORD TRUCK, VALUED UNDER $100.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons. SELF

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Russell T. Palmer Jr.

RUSSELL THOMAS PALMER, JR.